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Second report on unilateral acts of States

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Introduction

1. The topic of international unilateral legal acts of States was taken up at the fiftieth session of the International Law Commission, which at the time had before it the first report of the Special Rapporteur.[1] After differentiating acts that could be regarded as autonomous or independent — hence subject to the elaboration of specific rules governing their operation — from acts that should be excluded from the scope of the study, the report set out the constituent elements of a definition of unilateral legal acts of States which produce international effects.

2. On the basis of the first report of the Special Rapporteur, the report of the Working Group established by the Commission[2] and the comments made by representatives of States in the Sixth Committee of the General Assembly at its fifty-third session, held in 1998, the Commission arrived at the conclusion that the Special Rapporteur should submit a second report. That report would contain draft articles on the scope of the draft articles and on the definition (use of terms) and conditions of validity of the unilateral acts (declarations) of States, including, *inter alia*, the question concerning the organs competent to commit the State unilaterally on an international plane and the question concerning possible grounds of invalidity concerning the expression of the will of the State.[3]

3. Before presenting the texts in question with their respective commentaries, we should make some specific points concerning certain questions raised by Governments in the Sixth Committee in 1998 in commenting on the report of the Commission on this topic, namely: the relationship between the unilateral acts that are the subject of this study and the international responsibility of States; unilateral acts and estoppel; and unilateral acts relating to international organizations, particularly State acts addressed to such organizations.

4. In the first report we stated that while acts relating to the international responsibility of States were not without interest, they should also be excluded from the scope of the study to be undertaken. It was actually stated at the time that "acts contrary to international law and acts which, although in conformity with international law, may engage the international responsibility of a State" should be excluded, since the Commission was already dealing with those topics separately.[4] Some representatives in the Sixth Committee also suggested in 1998 that acts of that nature should be excluded from the scope of the study for the same reason, namely, that the Commission was considering the topic separately.

5. Other delegations, on the other hand, stated on the same occasion that acts relating to international responsibility should not be excluded from the study undertaken by the Commission. The representative of France indicated that he did not agree with the Special Rapporteur's proposal to exclude acts which gave rise to State responsibility: "... the question of whether, and to what extent, a unilateral act might entail State responsibility was of great interest; [and] fell logically within the scope of the Commission's study."[5]

6. There is unquestionably a certain relationship between the unilateral acts by which States engage their international responsibility and the unilateral acts that are the subject of the present study; they cannot, a priori, be separated clearly and distinctly. Rather, the proposal not to refer expressly to responsibility related to methodology, since the

[1] First report on unilateral acts of States (A/CN.4/486).

[2] A/CN.4/L.558; see also *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 192–200.

[3] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 200.

[4] A/CN.4/486, para. 47.

[5] Statement by the representative of France, A/C.6/53/SR.16, para. 53.

Commission considers the topic of responsibility on the basis of a report presented by the Special Rapporteur on the topic. That report examines internationally wrongful acts of States as acts giving rise to their international responsibility.

7. The question that arises is whether the unilateral acts by which States engage their international responsibility are strictly unilateral acts, which therefore fall within the scope of consideration of this specific category of acts, or, on the other hand, whether they fall within the realm of treaty relations.

8. It is a valid assertion that the acts of States which give rise to their international responsibility are unilateral legal acts in terms of form, be they of individual or collective origin. The acts that are of interest to the Commission in the present study, however, are legal acts which, in addition to being unilateral in form, are autonomous or strictly unilateral — in other words, not linked to a pre-existing norm, be it of treaty or customary origin. Acts relating to international responsibility do not by definition appear to be autonomous.

9. It seems difficult to conceive of an act which gives rise to the international responsibility of a State without being linked to the violation of a pre-existing norm, particularly the primary norm which the act in question is alleged to violate.

10. Whatever the case, the question of the relationship between internationally wrongful acts and unilateral acts of States is complex and should not be debated until further progress has been made on the topic of the international responsibility of States, which is being studied by the Commission. In the final analysis, two different regimes are involved, one relating to the international responsibility of States and the other to autonomous unilateral acts.

11. A second question that was referred to when the topic was considered in the Sixth Committee in 1998 was that of estoppel. Some representatives insisted that acts relating to estoppel should be examined in this study.

12. The first report submitted on the topic concluded that "there is a clear difference between declarations which may found an estoppel [in a trial] and declarations of a strictly unilateral nature".[6]

13. It is true that there is a certain relationship between strictly unilateral acts and estoppel, which is basically procedural. As indicated in the previous report, the nature of the primary obligations of a State, which oblige it to maintain a specific pattern of conduct, is not based, as in the case of a promise, on the actual declaration of intent by the State which formulates it, but on the secondary actions of a third State and on the detrimental consequences which would flow for that State from any change of attitude on the part of the declarant State, which generated an expectation in that other, third State.[7] Accordingly, there is a clear difference between declarations which may found an estoppel in a trial and declarations of a strictly unilateral nature, which have very specific characteristics.

14. It must be emphasized that a State formulates a unilateral legal act with the express intention of creating a new legal relationship, including, as has been indicated, obligations for that State. Such obligations are autonomous when they produce effects irrespective of their acceptance by the addressee State or of any subsequent attitude or conduct which may signify such acceptance. In estoppel, as the prevailing doctrine rightly points out, there is

[6] A/CN.4/486, para. 131.

[7] Ibid.

no creation of rights or obligations; rather, it becomes impossible to avail oneself of already existing rights and obligations in the context of a given proceeding.[8]

15. A third question that has arisen in the debate on the topic concerns acts relating to international organizations. This question should be considered from two different points of view: first, in the context of the formulation of the act, and, secondly, in the context of its legal effects in relation to other subjects of international law.

16. It is clear that the study undertaken by the Commission has as its subject unilateral legal acts of States which produce international effects, that is, legal acts formulated by States. A large number of representatives in the Sixth Committee in 1998 suggested that acts of international organizations should be excluded from the scope of the study, although it was noted that such acts could be genuine unilateral legal acts. It was emphasized that such acts were very specific and therefore required special rules, so that they fell outside the mandate of the Commission.[9]

17. In accordance with the debate on the topic in the Commission and the Sixth Committee, the present second report presents several draft articles together with their commentaries, concerning, *inter alia*:

(a) Scope of the draft articles;

(b) Definition of unilateral legal acts (declarations) of States;

(c) Capacity to formulate unilateral acts;

(d) Representatives of a State who can engage the State by formulating unilateral acts;

(e) Subsequent confirmation of acts formulated without authorization;

(f) Expression of consent;

(g) Formulation of reservations and conditional unilateral acts.

I. Scope of the draft articles

A. Draft article

18. The Special Rapporteur proposes the following article:

"**Article 1**

"Scope of the present draft articles

"The present draft articles apply to unilateral legal acts formulated by States which have international effects."

[8] P. Cahier, "Le Comportement des Etats comme source de droit et d'obligations", in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Genève, IHEI, 1968).

[9] Statements by the representatives of Italy (A/C.6/53/SR.18, para. 31); Bahrain (A/C.6/53/SR.21, para. 14); Switzerland (A/C.6/53/SR.17, para. 38); Germany (A/C.6/53/SR.18, para. 21); and the United States of America (A/C.6/53/SR.14, para. 48).

B. Commentary

19. Article 1 of the draft articles on unilateral acts should follow to a large extent the methodology of the Vienna Convention on the Law of Treaties of 1969, in which article 1 states expressly that the Convention applies only to treaties between States, thus excluding agreements other than treaties and treaties in which other subjects of international law, specifically, international organizations, participate.

20. The present article 1 should stipulate that the draft articles apply to unilateral legal acts (declarations) formulated by a State, thus excluding other subjects of international law, including international organizations.

21. The term "unilateral acts of States" should be clarified in article 2, as we shall see below, following, here too, the structure of the 1969 Convention, in which the term "treaty" is clarified in article 2 relating to the use of terms in the Convention.

22. The draft articles apply to unilateral acts formulated by States, whether individually or collectively, which have international legal effects. They thus exclude acts of a political character and acts which, while also unilateral and legal, do not produce international effects.

23. As noted in the first report and in the debate on this topic in the Commission, distinguishing political acts from legal acts is a truly complex matter. While abundant State practice exists, it has not been studied systematically, which creates certain difficulties.[10]

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[10] State practice is very important in relation to the formulation of such unilateral acts or declarations, which still present difficulties in terms of their interpretation and identification. A case in point would be unilateral declarations made by nuclear-weapon States aimed at providing certain guarantees of security to non-nuclear-weapon States.

> Can such arrangements — whose content, furthermore, varies and is subject to certain conditions in most cases — positively constitute unilateral legal declarations or acts in the sense with which the Commission is concerned, or are they simply political declarations or acts which engage their authors on that level?
>
> Some of these declarations were made publicly outside the framework of international bodies and others in the framework of the Conference on Disarmament. This would appear to be the case with regard to the similar declarations made by the Chinese Government, the Minister for Foreign Affairs of the Russian Federation and the Secretary of State of the United States of America on 5 April 1995, and the declarations made by the Permanent Representative of France and the Permanent Representative of the United Kingdom in the Conference on Disarmament on 6 April 1995, by which they undertook not to use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, with a number of conditions limiting the scope of the declarations.
>
> In his statement, the United States representative to the Conference on Disarmament, reiterating a statement made by the President of the United States, declared that "[t]he United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons" except in the case of "an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State."
>
> While the nuclear-weapon States considered such acts as binding, credible and reliable, the non-aligned countries belonging to the Group of 21 at the Conference considered that such acts or declarations did not engage the countries making them and therefore did not have a legal character. In this respect, the representative of Indonesia, speaking on behalf of the Group of Non-Aligned Countries, stated on 11 April 1995 in New York that such acts did not satisfy the long-standing demands of the non-aligned countries, it being understood, as the representative of the Islamic Republic of Iran indicated on that same date, that such guarantees must take the form

In order for an international judge to be able to determine the nature of such acts, it is fundamental to determine the intention of the State formulating them.

24. Jurisprudence has been clear-cut with regard to classifying such acts as legal or political. Thus, as the International Court of Justice stated in its well-known judgments in the *Nuclear Tests* cases, for example, the unilateral declarations made by representatives of the French State were unilateral acts of a legal nature. In the case of the territorial dispute between Burkina Faso and Mali, however, the Court ruled out the possibility that the statement made by the President of Mali on 11 April 1985 might be a legal act.

25. In the first case, the Court recognized that declarations

> "made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking."[11]

26. In the case of the territorial dispute between Burkina Faso and Mali, the Court concluded that such declarations can certainly have the effect of creating legal obligations for the State on whose behalf they are made, but only when it was the intention of the State making the declaration that it should become bound according to its terms.[12]

27. It should be made clear, moreover, that the act which the State formulates may be addressed to other subjects of international law, including international organizations. As stated earlier, a distinction should be drawn between the elaboration of the act, which is attributable to the State, and the legal relationship that might be created by means of such acts with other subjects of international law, including subjects other than States, which would depend on the effects of the acts in question.

28. The unilateral legal act which the State formulates can be addressed to another State, several States, the international community as a whole or any other subject of international law. The legal relationship between the State formulating the act and the addressee subject probably cannot exclude other subjects of international law, specifically, international organizations.

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of a negotiated and legally binding international instrument. The non-aligned countries members of the Group of 21 in the Conference on Disarmament continue to hold this view.

The question that arises is whether such declarations legally engage the States which make them even if they are subject to reservations and conditions that limit their scope and content, or, on the other hand, whether they are simply political positions that can only engage the international political responsibility of States in the event of non-compliance.

Stress should be laid on the need to distinguish between the legal force of such acts and their effectiveness, given the conditions that are incorporated into such declarations, a question that, regrettably, has not been addressed, much less defined in the Conference on Disarmament.

Such declarations, made publicly, with a specific purpose, addressed to a group of non-nuclear-weapon States and giving rise to expectations on their part, and probably prompting certain attitudes or types of conduct on their part, could be international legal engagements on the part of the declarant States. The ambiguity as to their nature is precisely one of the characteristics of such declarations that should be examined with great care. This further underscores the need to establish clear rules that may be able to regulate the operation of such international legal acts of States.

[11] *Nuclear Tests* case (Australia v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 267, para. 43; and *Nuclear Tests* case (New Zealand v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 472, para. 46.

[12] *Frontier Dispute* case, *I.C.J. Reports, 1986*, p. 573, para. 39.

29. Some representatives stated in the Sixth Committee in 1998 that they saw no reason to exclude from the scope of the study acts formulated in relation to other subjects of international law, especially considering that such acts might in practice be addressed both to States and to international organizations.[13]

30. If international organizations are to be considered at this stage within the scope of the study that the Commission has undertaken, it should be only in this context, that is, as already indicated, in relation to acts that might be addressed to them. For the time being, that question would not be of interest to the study being undertaken, since only the question of the formulation of such acts has been addressed up to now.

31. As delegations noted when the Vienna Convention on the Law of Treaties of 1969 was being drafted, acts of international organizations are complex. The fact that they were not included within the scope of application of the Convention did not mean that they did not exist, that they were not important in international practice, and that they did not have legal effects.

32. Consideration of legal acts elaborated by international organizations as part of the study of unilateral legal acts is a complex undertaking. It would encompass not only acts emanating from the organs of international organizations, which would require consideration of their competence and rules of decision-making, but also acts of officials charged with representing the organization in its international relations, an equally complex matter. While unilateral as to their form, such acts can be autonomous and can comprise autonomous obligations for the organization in its relations with States, other organizations or the international community as a whole.

33. Since an international organization, represented by its highest-ranking administrative officer, can in most cases conclude treaties with one or more States or with another international organization, it must be assumed that such an organization, represented by such an officer, can, in accordance with its internal rules, formulate unilateral legal acts which would no doubt be considered to belong to the category of acts that the Commission is now studying.

34. Another question that should be considered in due course in relation to acts formulated by an international organization is the difficulty posed by the lack of a legal regime common to international organizations, that is, a general constitutional law of international organizations. Admittedly, however, it can be recognized that there are certain common principles and that the law of the United Nations, or of certain international organizations, does exist. It must also be recognized that there are common special regimes, at least within the United Nations system, that are very important in practice, such as those relating to the international civil service or to the United Nations pension system.

35. The diversity of the rules, especially those relating to the functioning and competence of the various organs and the rules governing the adoption of their recommendations and decisions (resolutions), further complicates the question. There are terminological uncertainties and conceptual and logical ambiguities which render the world of such acts difficult to comprehend, identify and systematize.[14]

> "Les raisonnements conduits, à propos des actes étatiques, en s'appuyant sur le principe de la souveraineté, ne peuvent être purement et simplement transposés aux

[13] Statements by the representatives of Italy (A/C.6/53/SR.18, para. 31); Switzerland (A/C.6/53/SR.17, para. 40) and Portugal (A/C.6/53/SR.20, para. 31).

[14] Arbuet Vignalli, Jiménez de Aréchaga and Puceiro Ripoll, *Derecho Internacional Público*, vol. 1 (Montevideo, Fundación de la Cultura Universitaria, 1st ed., 1993), p. 276.

actes des organisations internationales: il faut prendre en compte la compétence limitée des organisations et le fait que ces actes atteignent les Etats tantôt en tant que membres de l'organisation (actes autonormateurs), tantôt en tant que sujets autonomes (actes hétéronormateurs); l'opposabilité des actes unilatéraux des organisations dépend d'un jeu d'éléments plus complexes que celle des actes unilatéraux étatiques."[15] (The arguments based on the principle of sovereignty that are put forth in relation to State acts cannot simply be transposed to acts of international organizations. It is necessary to take into account the limited competence of the organizations and the fact that such acts affect States both as members of the organization (autonormative acts) and as autonomous subjects (heteronormative acts). The opposability of unilateral acts of organizations depends on a more complex set of factors than does the opposability of unilateral acts of States.)

36. This does not, however, exclude the legal acts which a State formulates in the framework of international organizations and international conferences, such as, for example, unilateral declarations concerning negative security guarantees made in writing by certain States in the framework of the Conference on Disarmament.[16]

37. Whatever the case, the Commission should not, as some delegations stated in the Sixth Committee in 1998, rule out permanently the possibility of considering such acts in the future, although it is concentrating at present on the study of unilateral legal acts of States.

II. Definition of unilateral legal acts (declarations) of States

A. Draft article

38. The Special Rapporteur proposes the following article:

"Article 2

"Unilateral legal acts of States

"For the purposes of the present draft articles, 'unilateral legal act' means an unequivocal, autonomous expression of will, formulated publicly by one or more States in relation to one or more other States, the international community as a whole or an international organization, with the intention of acquiring international legal obligations."

B. Commentary

39. The Vienna Convention on the Law of Treaties of 1969 contains an article relating to the use of terms which is not a definition of the various terms used in the Convention, including "treaty".

40. As the term "unilateral acts of States" will be used throughout the draft, its meaning must be clear, hence a provision is needed to clarify it.

41. Regardless of whether or not it will be necessary to clarify other terms in a specific article like article 2 of the 1969 Convention, the draft articles on unilateral acts of States

[15] Patrick D'Ailler and Alain Pellet, *Droit international public* (Paris, LGDJ, 9th ed., 1999), p. 356.

[16] See *supra*, note 10.

should contain a specific provision that would clarify the meaning of the term "unilateral acts" without being an actual definition of it. By way of analogy, article 2 (1) (a) of the 1969 Convention, concerning the term "treaty", is not a definition either.

42. In the first report submitted on the topic, we attempted to separate the formal act from the material act and concluded that a declaration was a formal legal act that was more easily subject to the elaboration of specific rules governing its operation. We asserted, in fact, that the formal declaration was the means by which a State most often formulated unilateral acts, irrespective of their content and scope. It was stated at the time that in the context of the law of unilateral acts, the declaration was the instrument by which a State most often assumed international obligations, in the same way that in the context of international treaty law, the treaty was the most common instrument by which States made international legal engagements. Some representatives in the Sixth Committee in 1998 shared this view.[17]

43. Not all, however, endorsed this assertion. Some representatives pointed out that it was restrictive, and that to replace the term "unilateral act" by "unilateral declaration" could allow for the exclusion of specific acts. The observer for Switzerland, in particular, indicated in the Sixth Committee that a (unilateral) act usually took the form of a declaration, but perhaps not always. The expression "declaration" seemed to him unduly restrictive; he therefore preferred the term "act".[18] For his part, the representative of France indicated that it was necessary to avoid an overly broad or abstract definition of a unilateral act, and that it was unnecessary, on the other hand, to confine the topic within overly narrow limits.[19]

44. In our view, the definition of a unilateral act should revolve around a formal act, that is, a declaration, as a generic act distinct from the material act that the declaration may comprise. It is necessary to separate the *instrumentum* from the *negotium*, which may, for its part, be varied. This makes it somewhat difficult to establish common rules applicable to all possible types of *negotia*.

45. Nevertheless, in view of the differences of opinion which exist at present with regard to the acceptance of a formal act as a generic act, we will use the term "unilateral legal act" as a synonym for the expression "unilateral declaration". Admittedly, the assimilation of these two terms does not fully coincide with reality. It coincides, rather, with a question of a practical nature that may be superseded once it is determined whether in fact, in addition to declarations, there are other formal acts, and whether the rules that can be elaborated to govern their operation can take all those acts into consideration.

46. An autonomous unilateral legal act (declaration) or strictly unilateral act was defined in the first report as "an autonomous expression of clear and unequivocal will, explicitly and publicly issued by a State, for the purpose of creating a juridical relationship — in particular, to create international obligations — between itself and a third State which did not participate in its elaboration, without it being necessary for this third State to accept it or subsequently behave in such a way as to signify such acceptance."[20]

47. In the Sixth Committee there was support for the idea that a unilateral act is an autonomous (unequivocal) expression of will by a State which produces international legal

[17] Statements by the representatives of Bahrain (A/C.6/53/SR.21, para. 14), Austria (A/C.6/53/SR.15, para. 10) and Venezuela (A/C.6/53/SR.18, paras. 27–28).

[18] Statement by the observer for Switzerland, A/C.6/53/SR.17, para. 40.

[19] Statement by the representative of France, A/C.6/53/SR.16, para. 55.

[20] A/CN.4/486, para. 170.

effects.[21] Reference was made also to the autonomy of a unilateral act in the sense that it can produce legal effects under international law without it being necessary for one or more other States or subjects of international law to which it may be addressed to accept it or react to it in any other way.[22] We consider these observations to be very important for the elaboration of the definition of such acts.

48. In order to provide a basis for the drafting of this article, we deem it advisable to refer, however briefly, to what we consider to be the constituent elements of the definition of unilateral legal acts of States.

49. In the first report it was emphasized that the expression of will must be demonstrated unequivocally and publicly. The intention of the State which performs the act is fundamental to determining the nature of the act and the scope of the obligation which it intends to acquire by means of the act. This is consistent with several judgments of the International Court of Justice[23] and with the general opinion reflected in international doctrine.

50. It is essential that the State formulate the act (declaration) in the proper manner, that is, unequivocally and publicly. The terms "unequivocal" and "public" satisfy the need to limit unilateral acts to acts formulated with the intention of acquiring legal obligations and to prevent other acts from being attributed to the State. They are also consistent with the restrictive approach that must be maintained vis-à-vis the formulation and interpretation of legal acts of States. The Court, in relation to interpretation in particular, noted that "[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[24]

51. The author of the act must express unequivocally the will to create a juridical norm comprising an obligation for the author and rights for other subjects.[25] That will must, moreover, be expressed freely, as the unvitiated normative will of the author, as we shall see below when the consent of the author State is considered.

52. The clear and very specific purpose of the declaration is fundamental to the determination of the declarant State's intention to make an engagement and acquire an obligation. It is necessary above all that the purpose of the unilateral engagement be sufficiently clear, as the Court indicated in its judgments in the *Nuclear Tests* cases.[26]

53. The lawfulness of the purpose is also essential in the identification of the unilateral State act with which we are concerned, a question that will be examined later when the conditions of validity of the act are examined.

54. The act must, moreover, be given sufficient publicity to enable it to produce effects. In that connection, we should recall that when the topic was considered in the Commission in 1998, it was indicated that, in accordance with at least one judicial decision, publicity was not a prerequisite in order for unilateral acts to be legally effective, and that a promise

[21] Statements by the representatives of France (A/C.6/53/SR.16, para. 56); Switzerland (A/C.6/53/SR.17, para. 38), Venezuela (A/C.6/53/SR.18, para. 27); Tunisia (A/C.6/53/SR.18, para. 59) and Germany (A/C.6/53/SR.18, para. 21).

[22] Statements by the representatives of Venezuela (A/C.6/53/SR.18, para. 27) and Tunisia (A/C.6/53/SR.18, para. 59).

[23] *Nuclear Tests* case (Australia v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 267, para. 43; and *Nuclear Tests* case (New Zealand v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 267, para. 44, and p. 472, para. 46.

[24] *I.C.J. Reports 1974*, p. 267, para. 44, and pp. 472–473, para. 47.

[25] Didier Sicault, *Du caractère obligatoire des engagements unilatéraux en droit international public*, vol. 4 (Paris, RGDIP, 1979), p. 665.

[26] *Nuclear Tests*, op. cit., p. 267, para. 43, and p. 269, para. 51.

could, for example, legally engage the State which formulated it even if it did so behind closed doors.[27] It was also stated that publicity was related to the proof of the act's existence and to the identification of its addressee. This question will, however, be addressed in further detail at a later stage.

55. In our view, however, publicity is a defining element of a unilateral act. In that connection, a unilateral act must be performed publicly, that is, the addressee State must be made aware of it, as the Court indicated in its 1974 decisions in the *Nuclear Tests* cases referred to earlier. In point of fact, a State act acquires its meaning and final form when it is made public, or at least when the addressee State or States are made aware of it. Otherwise, the act would be without legal force.

56. A declaration may, of course, be made *erga omnes*, meaning that it may not necessarily be addressed to any one State in particular, as can be seen in the Court's judgments in the above-mentioned *Nuclear Tests* cases.[28]

57. Whatever the case, a unilateral act must be formulated in relation to a specific addressee, be it one or more States or the international community as a whole, and not in a vacuum. The Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, did not consider the declaration made by the Junta of National Reconstruction of Nicaragua to the Organization of American States (OAS) to be a legal engagement. It explained that it had to be very cautious when faced with a unilateral declaration having no specific addressee.[29]

58. It should be made clear, moreover, that a unilateral act (declaration) may be formulated by a State or by several States, as a single expression of will. It may be formulated by means of an individual, a collective or a joint act, in relation to one or more other subjects that have not participated in its elaboration; this is the basis of the view that the act in question is a heteronormative one.

59. This situation must also be differentiated from the one arising from the adoption of so-called collateral agreements, as referred to in articles 34 et seq. of the Vienna Convention of 1969, and to which the first report referred extensively.

60. In referring to the origin of the act, the definition uses the term "formulated", which is considered to be more appropriate than "elaborated", the term used more frequently in treaty law and in relation to joint acts.

61. The definition makes it clear that we are dealing with an autonomous expression of will that can comprise obligations only for the State or States formulating it, since a State cannot impose obligations on other States without their consent. This is consistent with an established principle of international law, namely, *pacta tertius nec nocent nec prosunt*.

62. Of course, the unilateral acts in question are autonomous or independent of pre-existing juridical norms, for, as noted in the first report on this topic, a State can adopt unilateral acts in the exercise of a power conferred on it by a pre-existing treaty or customary norm. This appears to be the case with regard to, *inter alia*, unilateral legal acts adopted in connection with the establishment of an exclusive economic zone. Such acts, while of domestic origin, produce international effects, specifically, obligations for third States which did not participate in their elaboration. Naturally, such acts go beyond the scope of strictly unilateral acts and fall within the realm of treaty relations.

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[27] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 171.

[28] *I.C.J. Reports 1974*, p. 269, para. 50.

[29] Ibid., p. 132, para. 261.

63. The definition does not expressly mention the fact that such unilateral acts do not require either the acceptance of the addressee subject or any other conduct which may signify acceptance on the subject's part. It is therefore understood that such acts are characterized precisely by the lack of the need for such acceptance, despite its having been included in the previous definition. This obviates the need for an express clarification in the draft article on definition.

64. Lastly, with regard to the form in which consent is expressed by the State, we should note that it appears unnecessary to specify in the definition of the act (declaration) whether the acts or declarations in question are made in writing or orally, so long as it is understood that the form of expression has no bearing on the intention to make an engagement. The State or its agent can make an engagement by means of either a written or an oral declaration. In this connection, the International Court of Justice, in its 1974 decision in the *Nuclear Tests* cases referred to earlier, stated that

> "With regard to the question of form, it should be observed that this is not a domain in which international law imposes any spec al or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive."[30]

III. Capacity to formulate unilateral legal acts

A. Draft article

65. The Special Rapporteur proposes the following article:

"Article 3

"Capacity of States

"Every State possesses capacity to formulate unilateral legal acts."

B. Commentary

66. The fundamental conditions that must be met for a legal act to be valid are the imputability of the act to a subject of law and the observance of the rules relating to the formation of will. It must be reiterated that while the procedure of elaborating the act is regulated by domestic law, the validity of its effects pertain to international law.

67. When the Vienna Convention on the Law of Treaties was in the drafting stage, the Commission discussed very carefully the draft article on capacity to conclude treaties, taking into account not only the report of the Special Rapporteur, but also the views of States. After a long debate, the discussion ended in the drafting of article 4 of the Convention. It simply restates the principle that all States have the capacity to conclude treaties, based, in turn, on the principle of the legal and sovereign equality of States.

68. In the case of the draft articles on unilateral acts, based on the discussion in the Commission, it was deemed advisable to submit an equally simple article that would merely

[30] *I.C.J. Reports 1974*, pp. 267–268, para. 45, and p. 473, para. 48.

reflect the capacity of States to formulate unilateral legal acts (declarations). That would avoid rehashing the debate held on the question at the time.

69. This provision, like article 6 of the Vienna Convention of 1969, must be limited to States. It should be recalled that originally, when the Vienna Convention was in the drafting stage, wording was proposed in the Commission that would include "other subjects of international law", as well as the question of the capacity of the entities within a federal State. At one point in the Commission's debate, it was even suggested that a provision on State capacity should be eliminated, as was done in the Vienna Convention on Diplomatic Relations of 1961, although that had not been raised at the Vienna Diplomatic Conference.

70. While it was unnecessary to include such an article in the Vienna Convention on Diplomatic Relations of 1961, it was deemed important to include it when the 1969 Convention was being drafted. It would now appear necessary to include a provision of this nature in the present draft articles. As Mr. El-Erian stated in the Commission in 1985,

> "Capacity to establish diplomatic relations had not been regulated in the draft articles on diplomatic relations because of the different context in which it had been raised; there had been a controversy as to whether the establishment of diplomatic relations was a right or an attribute of international personality."[31]

For his part, Sir Humphrey Waldock, Special Rapporteur on the topic of the law of treaties, noted in his first report that the question of capacity was much more important in the context of the law of treaties than in the context of diplomatic relations; it was therefore important and desirable to include a provision on that subject.[32]

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[31] *Yearbook ... 1965*, vol. I, 779th meeting, para. 54.

[32] *Yearbook ... 1962*, vol. I, 640th meeting, para. 2.

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Second report on unilateral acts of States

By Victor Rodríguez Cedeño, Special Rapporteur

Addendum

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IV. Representatives of the State for the purpose of formulating unilateral acts

A. Draft article

71. The Special Rapporteur proposes the following article:

"Article 4
"Representatives of a State for the purpose of formulating unilateral acts

"1. Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

"2. A person is also considered as representing a State for the purpose of formulating unilateral acts on its behalf if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes.

"3. Heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs are also considered as representatives of the State in relation to the jurisdiction of that conference, organization or organ."

B. Commentary

72. A treaty operation is by its very nature complex and differs from an operation involving unilateral acts of States. Adoption, a State's decision to consent to be bound by a treaty, international notification of that decision and entry into force are the fundamental stages of a treaty operation. In the sphere of unilateral acts of States, however, the formulation of such acts is based on the unilateral intention to make an engagement and acquire unilateral obligations at the international level. The formulation of the unilateral acts with which we are concerned could, in that sense, be regarded as less rigid.

73. The State is represented at the international level by the bodies competent for that purpose. International law determines the conditions under which these bodies can engage the State vis-à-vis other States or other subjects of international law and indicates the privileges and immunities necessary for the exercise of their international functions. Within its own sphere, domestic law regulates the respective jurisdictions.[33] The expression of a State's consent is, in fact, regulated by domestic law, while the effects of the legal act concluded or formulated would appear to be regulated by international law. It is important to underscore this point before examining the present article.

74. Unilateral acts must be performed (formulated) by a body qualified to act on behalf of the State in the sphere of international law, whether in general, in a particular sphere or in a given matter. In order for the act to comprise obligations for the State, the organ from which it emanates must have the power to engage the State at the international level.[34]

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[33] L. A. Podesta Costa and José María Ruda, *Derecho Internacional Público* (Buenos Aires, Tip. Editora Argentina, 1985).

[34] Krzysztof Skubiszewski, "Les actes unilatéraux des Etats", in *Droit international: bilan et perspectives*, vol. I (Paris, Pédone, 1991), p. 243, para. 47.

75. The structure of article 7 of the Vienna Convention on the Law of Treaties should guide the drafting of the present draft article on unilateral acts, taking into account certain peculiarities to which reference should be made. It should, of course, be stated that in the Vienna Convention, article 7, concerning full powers, was considered separately from article 46 (draft article 31) relating to the domestic legal provisions connected with the capacity to conclude treaties, and from article 47 (draft article 32) relating to the specific restriction of the power to express a State's consent, despite the fact that, as some members of the Commission noted at the time,[35] they were apparently closely related. In reality, as others indicated on that same occasion,[36] the questions involved were completely different: article 7 (draft article 4) deals with the powers of the negotiating body, while articles 46 and 47 (draft articles 31 and 32) refer to the validity of a treaty in the context of the capacity to conclude treaties, which is determined by domestic rules.

76. Admittedly, as noted earlier, a restrictive approach is called for where it is a question of unilateral acts of States, particularly with regard to their elaboration, interpretation and effects.

77. In the law of treaties, international engagements and the obligations flowing therefrom emerge from generally complex negotiations from which mutual benefits are derived. Generally speaking, the parties involved in such negotiations propose that reciprocity be applied with regard to such benefits. In the case of unilateral acts, the State which makes an engagement and assumes certain obligations adopts an act in whose formulation it alone participates. This makes it a particular act.

78. It should also be noted that the State has recourse to the modality of formulating unilateral acts, in particular, where circumstances so require, especially where a negotiation with one or more other subjects of international law seems difficult. This would appear to be the case with regard to the unilateral declarations formulated by the French Government in the *Nuclear Tests* cases which, moreover, form a whole, as the International Court of Justice stated. A similar situation arose in the case of the declarations formulated by nuclear-weapon States which contain negative security guarantees addressed to non-nuclear-weapon States.[37]

79. States can be engaged at the international level only by their representatives, as that term is understood in international law, that is, those persons who by virtue of their office or other circumstances are qualified for that purpose.

80. In the case of unilateral acts it must first be recognized that, as in the law of treaties, heads of State, heads of Government and ministers for foreign affairs are presumed to be able to engage the State in its external relations, as confirmed by doctrine, international jurisprudence and the Commission itself at the time when it prepared the draft articles on the law of treaties.

81. In its 1966 report to the General Assembly, the Commission, in commenting on article 6 of the draft articles on the law of treaties which became article 7 of the Convention, stated that:

> "*Paragraph 2* sets out three categories of cases in which a person is considered in international law as representing his State without having to produce an instrument of full powers. In these cases, therefore, the other representatives are entitled to rely

[35] Statements by Messrs. Yasseen, Rosenne and Amado at the 780th meeting of the Commission on 10 May 1965. *Yearbook ... 1965*, vol. I, paras. 30, 32 and 54–55.

[36] Ibid., statement by Mr. Ago, para. 60.

[37] See *supra*, note 11.

> on the qualification of the person concerned to represent his State without calling for evidence of it."[38]

The qualification of such persons is inherent in their office, as accepted by doctrine and jurisprudence and in practice and embodied in the Vienna Convention of 1969, in the article referred to above.

82. The qualification of a State's minister for foreign affairs to engage the State at the international level has been confirmed not only by doctrine but by international tribunals, as in the *Legal Status of Eastern Greenland* case, for example, where the Permanent Court of International Justice stated that "a [verbal] reply ... given by the Minister for Foreign Affairs on behalf of his Government ... in regard to a question falling within his province, is binding upon the country to which the Minister belongs".[39]

83. The same statement is made with respect to the President and to the head of Government, or Prime Minister, who unquestionably have the capacity to engage the State without having to produce full powers. The International Court of Justice, in a case concerning the application of the Genocide Convention, confirmed that basic assumption of international relations when it stated:

> "According to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations (see, for example the Vienna Convention on the Law of Treaties, Art. 7, para. 2 (a))."[40]

84. In addition to heads of State, heads of Government and ministers for foreign affairs, other high-ranking State officials can formulate unilateral acts and legally engage the State in spheres or specific areas of interest to the States concerned.

85. Owing to the technical character of certain questions, persons other than those mentioned above may be qualified to engage the State in those areas. As Cahier notes, such bodies are provided with full powers which allow other States to know that they have the capacity to engage the State which they represent.[41]

86. On several occasions, the Court has considered acts and patterns of conduct of State officials, adopting interesting positions regarding their representativeness. In the *Temple of Preah Vihear* case, for example, the Court considered certain acts emanating from certain officials in deciding to which State the temple belonged.[42] In the *Gulf of Maine* case, the Court considered that a letter emanating from an official of the Bureau of Land Management of the Department of the Interior of the United States of America and relating to a technical question did not constitute an official declaration by the United States Government concerning its international maritime boundaries.[43]

87. In the *Nuclear Tests* cases, the Court concluded that the statements made by the President of the French Republic

> "and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute

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[38] *Yearbook ...1966*, vol. II (A/6309/Rev.1, part II), para. 38 (commentary on article 6, para. 4).

[39] *P.C.I.J.*, 1933, Series A/B, No. 53, p. 71

[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary objections, Judgment, I.C.J. Reports 1996*, p. 622.

[41] P. Cahier, loc. cit. (*supra*, note 8), p. 243.

[42] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, pp. 25 and 30–31.

[43] *Case concerning the delimitation of the maritime boundary in the Gulf of Maine area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, pp. 307–308, para. 139.

a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made."[44]

88. There appears to be no doubt that in the sphere of unilateral acts there are certain high-ranking officials, other than the head of State or Government and the minister for foreign affairs, who are permanently qualified to engage the State in specific areas under their jurisdiction.

89. Without dispensing with the restrictive character that should be attributed to unilateral acts, it seems necessary for such officials to be able to represent the State in specific areas of international relations, as would be the case for national officials who participate in international negotiations concerning the exploitation and use of common spaces.

90. International practice has not been examined in great detail, much less systematically, in order to determine whether the acts of certain high-ranking officials can engage the State. It does not seem easy to determine whether States recognize, at least in the treaty sphere, that a State acquires engagements through the formulation of acts other than an agreement signed by persons qualified in accordance with the Vienna Convention of 1969.

91. As the Commission has noted, confidence in international relations is undoubtedly crucial to the maintenance of harmonious relations and international peace and security. The declarations which officials make in given areas should guarantee to the one or more other subjects of international law to which they are addressed the necessary confidence in their mutual relations.

92. In that connection, the representatives whom the States concerned recognize as their representatives in given areas can engage the State. In view of the restrictive character of unilateral acts, referred to above, this should exclude acts performed by officials who do not have such capacity. It can then be accepted that representatives of a State at a given level and in given areas can engage the State by virtue of such permanent inherent capacity. This would be the case for high-ranking officials, namely, ministers and special technical representatives in given areas, which might include ministers or high-ranking officials taking part in negotiations involving a common interest, such as common spaces and resources.

93. This is perhaps one of the crucial questions that should be decided in order to identify persons qualified to engage the State in its external relations and to acquire obligations on behalf of their State. While certain persons can be considered as falling into this category, it is also necessary to exclude those not considered to have the permanent inherent power mentioned earlier.

94. In foreign affairs, officials of technical ministries generally exercise powers relating to their spheres of jurisdiction (foreign trade, transport and communications, health, labour, and so on). In short, many State organs now participate in the conduct of foreign affairs, and this situation is necessarily reflected in the sphere of unilateral acts.[45]

95. The principle of good faith is important with respect to acts formulated by persons who are understood to be inherently qualified to engage the State. According to Skubiszewski, except in cases where there is a blatant violation of domestic norms involving a fundamental rule, the addressee of the unilateral act can invoke the principle of good faith in considering the State organ to be qualified.[46]

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[44] See judgments cited (*supra*, note 11), *Australia v. France*, para. 49, and *New Zealand v. France*, para. 51.

[45] Skubiszewski, op. cit. (*supra*, note 34), p. 243.

[46] Ibid.

96. Following the structure of article 7 of the Vienna Convention of 1969, the present draft article provides that representatives of a State to another State or to an international organization with which their State maintains relations and representatives of a State to a conference, as well as certain persons, would be qualified to engage the State if it appears from the practice of the States concerned or from other circumstances that the intention of those States was to consider those persons as representing the State for such purposes.

97. A different approach should be taken to the question of full powers in the case of unilateral acts than in the case of the law of treaties. It is true that the State grants full powers to certain persons to enable them to represent it in concluding a treaty, that is, to empower them so that they may therefore be competent to engage the State in a given negotiation. In the context of unilateral acts, however, full powers should be understood in a different sense. They would not be extended in order to enable a person to represent the State in the elaboration of a treaty, but rather to enable a person to act in a broader context, that is, either within or outside the framework of a negotiation, but in any case in relation to a given question. The State would implicitly grant permanent full powers to an official to enable him to conduct foreign affairs on a given issue.

98. While in the law of treaties the extension of full powers is essential in certain cases in order to be able to engage the State, in the sphere of unilateral acts it does not appear to be necessary to refer to such powers.

99. As stated, the circumstances in which a unilateral act is formulated, the form it takes (generally speaking, a declaration) and the obligations that flow from it differ substantially from a treaty operation. The specific nature of the unilateral acts that the Commission is now studying means that full powers need not be considered as part of the qualification of persons who are able to represent or act on behalf of the State.

V. Subsequent confirmation of an act formulated without authorization

A. Draft article

100. The Special Rapporteur proposes the following article:

"Article 5
"Subsequent confirmation of a unilateral act formulated without authorization

"A unilateral act formulated by a person who cannot be considered under article 7 as authorized to represent a State for that purpose and to engage it at the international level is without legal effect unless expressly confirmed by that State."

B. Commentary

101. Article 7 of the Vienna Convention on the Law of Treaties specifies the persons qualified to engage the State at the international level because of their office, because such qualification results from practice or because full powers have been assigned to them for that purpose, as referred to above, with the exception of the full powers that would not appear to be necessary in the context of unilateral acts of States.

102. Article 8 of the Vienna Convention of 1969 raises the possibility that a State can subsequently confirm, implicitly or explicitly, an act relating to the conclusion of a treaty when the act is performed by a person other than the persons mentioned in article 7 of the Vienna Convention of 1969.

103. When the draft articles on the law of treaties were elaborated, major questions were raised in the Commission concerning the link between international and domestic law. The conclusion was reached that the elaboration of the act was governed by domestic law, although its formulation was of interest to international law. In the sphere of unilateral acts, the principles and concepts underlying the Vienna Convention of 1969 continue to apply, although, as stated earlier, the question should be examined from a more restrictive standpoint, given the special characteristics already mentioned of this category of legal acts of States.

104. Two different situations should be envisaged in relation to such acts: (1) where the act is formulated by a person not qualified to engage the State, and (2) where, although the act is formulated by a person qualified to represent the State in the international sphere, his actions exceed his jurisdiction. While these are two different situations, the basic issue is the same: the actions of a person not qualified to engage the State in the formulation of a given act.

105. When the draft articles on the law of treaties were discussed in the Commission, one member indicated that the validity of an act formulated by an unqualified body was doubtful; nevertheless, if neither the executive body nor the parliament expressed disagreement immediately after receiving information about the treaty, it was implicitly confirmed.[47] There would appear to be a greater need for that rule in the law of treaties than in the context of unilateral acts of States.

106. During the Vienna Conference a draft amendment[48] was submitted which stated that an act relating to the conclusion of a treaty, executed by a person who could not be considered under article 6 as authorized to represent a State for that purpose, would have effect only if it was subsequently expressly confirmed by that State. As the proposal was rejected, the issue was resolved, and it was decided that the act could be confirmed both implicitly and explicitly, as provided in article 8 of the Convention.

107. In the context of unilateral acts it would seem appropriate, given their characteristics, that they be expressly confirmed if they are to have legal effect. This further guarantees the real intention of the State which formulates the act, affording greater security in international relations, an aim that is still the basis for the elaboration of the present draft articles. The express nature of the confirmation undoubtedly avoids misunderstandings as to the will of the State which formulates the act. To be sure, a revocable act cannot be confirmed if not expressly, as a representative rightly indicated at the Vienna Conference of 1969.[49]

108. The draft article being commented on here states also that it is referring to a person not authorized "to engage the State at the international level". This is not the case with respect to the Vienna Convention of 1969, although it can be inferred.

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[47] Statement by Mr. Verdross at the 674th meeting of the Commission on 7 May 1963. *Yearbook ... 1963*, vol. I, para. 7.

[48] A/CONF.39/C.1/L.69, submitted by Venezuela.

[49] Mr. Carmona, the representative of Venezuela, speaking at the 14th meeting of the Vienna Conference on the Law of Treaties, Vienna, 5 April 1968.

VI. Validity of unilateral legal acts: expression of consent and causes of invalidity

A. Draft articles

109. The Special Rapporteur proposes the following draft articles:

"Article 6
"Expression of consent

"The consent of a State to acquire an obligation by formulating a unilateral act is expressed by its representative when making an unvitiated declaration on behalf of the State with the intention of engaging it at the international level and assuming obligations for that State in relation to one or more other subjects of international law."

"Article 7
"Invalidity of unilateral acts

"A State may invoke the invalidity of a unilateral act:

"1. If the expression of the State's consent to formulate the act was based on an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

"2. If a State has been induced to formulate an act by the fraudulent conduct of another State;

"3. If the expression of a State's consent to be bound by a unilateral act has been procured through the corruption of its representative directly or indirectly by another State;

"4. If the expression of a State's consent to be bound by a unilateral act has been procured by the coercion of its representative through acts or threats directed against him;

"5. If the formulation of the unilateral act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

"6. If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;

"7. If the expression of a State's consent to be bound by a unilateral act has been in clear violation of a norm of fundamental importance to its domestic law."

B. Commentary

110. The Commission, in its report submitted to the General Assembly in 1998, stated, in relation to the future work of the Special Rapporteur: "He could also proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions

of validity of the unilateral acts [declarations] ...."[50] During the discussion of the report of the Commission on this topic in the Sixth Committee in 1998, some representatives also suggested that the Commission should concentrate in the future on questions relating to the elaboration and conditions of validity of unilateral acts.[51]

111. Generally speaking, in order for a legal act to be valid in international law and to have legal effect, certain conditions must be met. First, the act must be attributable to a subject of international law and the representative of the State concerned must have the capacity to represent it, that is, be qualified to engage the State at the international level. As indicated above, this is regulated by domestic legal norms, particularly constitutional norms, a question that was considered when draft articles 3 and 4 were commented on.

112. As in the law of treaties, the source of unilateral acts of States resides in the expression of will, which must be free of irregularities. As is well known, a legal act can have effect only if it is valid. In case of invalidity, a unilateral act can be declared void and will therefore be without legal effect, as stipulated in article 69, paragraph 2, of the Vienna Convention, relating to the consequences of invalidity of a treaty.

113. The expression of will must also be formulated in the proper manner, at least by the one or more subjects of international law who are its addressees or beneficiaries. This is related to its public character (although for some, this would be related to proof of the existence of the act and not to its existence per se).

114. Moreover, in order for the act to be legally valid and to have legal effect, its object must be lawful. This is related to acceptance of the existence of international public order and to peremptory or *jus cogens* norms, as we shall see below.

115. Without doubt, the lawful object of unilateral legal acts of States must be consistent with the norms of so-called international public order, or, as Georges Scelle calls it,[52] international common law, in order for such acts to be considered valid and, consequently, to have legal effect. It should be stated that the literature is not entirely consistent in accepting the existence of a higher legal order. Thus, Rousseau, for instance, in indicating that the requirement that the act be lawful occupies only a secondary place in the theory of international law, notes that "international law is intrinsically valid without any reference to a higher, metalegal or extralegal order".[53]

116. Moreover, in order for a unilateral legal act of a State, in particular, to be valid, it "must always be in conformity with the fundamental rules of international law applicable to the matter under consideration ... Unilateral acts may not derogate from general international law, much less from the obligations assumed by their authors."[54]

117. The expression of will by the author of the legal act is, as stated, essential to the creation of the act and to the effects which the act is intended to produce. The expression of will is so important that a portion of the literature defines a legal act as an expression of will, which vindicates the importance attached to irregularities capable of invalidating it, and to the interpretation of the act.

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[50] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 200.

[51] Statements by the representatives of Austria (A/C.6/53/SR.15, para. 10) and Romania (A/C.6/53/SR.18, para. 3).

[52] Georges Scelle, *Précis de droit des gens, principes et systématique*, vol. II (Paris, Recueil Sirey, 1934), pp. 15 et seq., cited in Pellet and Daillier, op. cit. (*supra*, note 15), p. 200.

[53] Charles Rousseau, *Droit international public*, vol. I (Paris, Recueil Sirey, 1971), pp. 142–143.

[54] Skubiszewski, op. cit., p. 242.

118. In the context of the law of treaties, the means of expressing consent to be bound by a treaty are set out in articles 11 et seq. of the 1969 Convention. They provide that a State can express its consent by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or any other means which States may deem appropriate.

119. The question of expression of will in the case of unilateral acts of States is also essential. What is fundamental here is the moment of expression, that is, the moment when the author, by means of a declaration, expresses his intention to make an engagement and acquire obligations. The moment should, of course, be viewed in a broad sense and be equated with the process of formulation, the context. This is consistent with the rules of interpretation accepted and reflected in the Vienna Convention of 1969.

120. The expression of will and the intention of the State to make an engagement and acquire obligations are inseparable. The representative of the State can express a will on its behalf with the intention of engaging the State at the international legal level, for otherwise we would be dealing with acts which should be excluded from the scope of our study, as noted on several previous occasions.

121. Intention is fundamental to the interpretation of the State act. It should be noted that, while the 1969 Convention states that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, such terms should be given a special meaning if it is established that the parties so intended.[55] This question will, however, be addressed at a later stage.

122. The expression of will demonstrates the author's intention to create a legal obligation. As Jacqué rightly states, if this intention does not exist, there is no legal act.[56] The author of the act must express the intention to assume an obligation vis-à-vis the addressee.

123. On several occasions, the International Court of Justice has considered intention, as a universally recognized basic principle applicable to both domestic and international law,[57] to be the fundamental element of interpretation. In the *Nuclear Tests* case, the Court stated that

> "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, ... is binding."[58]

Further in that same decision, the Court stated:

> "Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made."[59]

124. It may be said that we are in the presence of a will to create a legal act

> "dès lors que l'objectif à atteindre par le destinataire de l'acte est suffisament précis de telle sorte que l'on puisse identifier tout comportement qui ne se conformerait pas

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[55] Vienna Convention on the Law of Treaties of 1969, art. 31.

[56] Jean-Paul Jacqué, *Eléments pour une théorie de l'acte juridique en droit international public* (Paris, LGDJ, 1972), p. 121.

[57] *South West Africa* cases, separate opinion of Judge Van Wyk, *I.C.J. Reports 1966*, pp. 84–85; *Barcelona Traction* case, *I.C.J. Reports 1964*, p. 123; *Norwegian Loans* case, *I.C.J. Reports 1957*, p. 7.

[58] *I.C.J. Reports 1974*, p. 267, para. 43.

[59] Ibid., p. 269, para. 49.

à la norme. C'est à cette condition que l'on se trouve devant une norme juridique et non un simple désir politique."[60] (once the goal to be attained by the addressee of the act is sufficiently clear that any conduct not consistent with the norm may be identified. This is the circumstance in which a legal norm exists, not merely a political desire.)

125. The intention to make an engagement must be clear and unequivocal, and must also be formulated, as we shall see, in the proper manner. Intention is a term

> "dont il est fait usage à propos de l'interprétation des actes juridiques et qui désigne ce que l'auteur ou les auteurs d'un acte ont eu réellement en vue de convenir, de faire, d'obtenir ou d'éviter, que cela soit révélé par l'acte lui-même ou par d'autres éléments".[61] (which is used in connection with the interpretation of legal acts and which designates what the author or authors of an act really intended to agree on, do, obtain or avoid, whether this is shown by the act itself or by other factors.)

126. It should also be noted that lack of clarity does not signify lack of intention, a point that is directly related to the degree of obligation, if that term is acceptable. Once again the question arises of the nature of the obligation, that is, whether the obligation involved is one of behaviour or conduct or one of result, a point that the literature discusses in depth.[62] The question of international obligations is examined in great detail by the Commission in connection with the topic of international responsibility, which has an important relationship to the law of treaties and the law of unilateral acts, particularly where the State's conduct differs from what is required under the obligation it assumes by means of some unilateral acts.

127. These obligations can be obligations of conduct, that is, those which determine the behaviour or conduct which the State must assume, without prejudging the outcome. On the other hand, they can be obligations of result, which leave the State free to choose the means it will use to obtain the result in question.

128. The intention, which must always be clear if it is to be the basis of the engagement made by the State, may be express or implicit, a question that is for the body charged with its interpretation to determine. In that connection, we should recall the judgments rendered by the International Court of Justice in the *Nuclear Tests* cases, in which the Court concluded that the intention of the declarant State was to legally bind itself at the international level.

129. The expression of consent must be free of irregularities, as stipulated expressly in articles 48 to 52 of the Vienna Convention of 1969.

130. The question of the validity of a legal act requires us to examine the regime governing the invalidity of legal acts in international law, which is essential in order to determine the validity of the act and its legal effect.

131. Without doubt, the rules applicable to treaty acts are largely applicable to unilateral legal acts of States. For this reason, the comments on the present draft article should take into consideration the rules laid down on the subject in relation to treaty acts, with special reference to treaties under the 1969 Convention.

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[60] Jacqué, op. cit., p. 127.

[61] *Dictionnaire de la terminologie internationale de Jules Basdevant* (Paris, Recueil Sirey, 1960), p. 341.

[62] See, for example, Paul Reuter, "Principes de droit international public", *Recueil des cours* ..., vol. 103, (1961–II), p. 472.

132. In the case of unilateral acts, error, fraud, corruption of the State's representative, violence committed against the State or its representative and the peremptory norms of international law or *jus cogens* should also be taken into account in this sphere, although probably under different circumstances, depending on the specific nature of such acts.

133. In the first place, a State may invoke the invalidity of a unilateral act where the act has been formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time of its formulation, if it formed an essential basis of its consent. This question was discussed extensively when the Vienna Convention on the Law of Treaties was being drafted.

134. A State may not invoke an error of fact if it contributed by its conduct to the error, as stipulated in article 48, paragraph 2, of the Vienna Convention. The International Court of Justice has in the past considered this to be a well-established principle of international law.[63]

135. Moreover, as in the 1969 Convention, a State may invoke the invalidity of an act if it has been induced to formulate the act by the fraudulent conduct of another State. In spite of the rarity of such a situation in a treaty context[64] and the doubts expressed by the Special Rapporteur, Sir Humphrey Waldock, as to whether fraud should be included as a cause of invalidity of a treaty, the Convention includes it in article 49. The Special Rapporteur indicated at the time that he had doubts as to whether fraud could occur in a treaty context. While the possibility existed, there had never been a specific instance of its having induced a State to consent to a treaty.[65]

136. In spite of certain misgivings, fraud should be included in the present draft article as a cause of invalidity. If the situation can arise in a treaty context, then it can also arise in the context of the formulation of a unilateral act. Fraud can even occur through omission, as when a State which has knowledge of certain realities does not convey it, thus inducing another State to formulate a legal act.

137. A State may invoke invalidity of a unilateral act if the act has been formulated by means of corruption of or violence against the State's representative or a threat directed against the State by one or more other States. Undoubtedly, such causes of invalidity, provided for in the Vienna Convention of 1969, are also applicable to unilateral acts of States. In all such cases, the acts formulated are void, which also raises the question of whether these acts are absolutely or relatively void.

138. A unilateral act is also void if it is formulated under the threat or use of force in violation of the principles of the Charter of the United Nations, a question that was raised in the same terms in the 1969 Convention.

139. A unilateral act is also void if it is contrary to a State's own previous norms or to a peremptory or *jus cogens* norm, the latter being understood as a norm accepted and recognized by the international community, as stated in the 1969 Convention. This definition gave rise to an interesting doctrinal debate.

140. Some norms of international law may be derogated from by the parties; this is accepted under international law. It is also accepted, however, that some of these norms may not be derogated from. It is beyond all doubt that such norms, while difficult to identify, have emerged gradually, with benefits for the organization of international society, since the

[63] *Case concerning the Temple of Preah Vihear, I.C.J. Reports 1962*, p. 26.

[64] Charles E. Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Sirey, 1970), p. 147.

[65] See *Yearbook ... 1963*, vol. I, 678th meeting, p. 29.

question was first raised at the time of the elaboration of the Vienna Convention on the Law of Treaties. At issue is the distinction between norms of *jus dispositivum* and of *jus cogens*. The latter are a constraint on the capacity to formulate unilateral legal acts; this would include some norms deriving from the Charter of the United Nations and others contained in basic conventions, such as those relating to slavery and genocide, among many others. These are peremptory norms of general international law which admit of no exceptions.[66]

141. Lastly, the fact that an act as formulated may be contrary to domestic legal norms — specifically, constitutional norms — may invalidate it if the State invokes its invalidity. There can be no doubt that the rule set out in article 46 of the Vienna Convention of 1969 is fully applicable to unilateral acts. The State representative, as indicated above, should be qualified to represent the State in its international relations, and, furthermore, the act formulated may not be contrary to constitutional norms. Indeed, the representative who formulates the act must act within his sphere of jurisdiction if the act is to have legal effect.

VII. A comment on reservations and conditions in relation to unilateral acts and on the non-existence of unilateral acts

142. The formulation of reservations and the laying down of conditions are possible in the treaty sphere. This would not, however, appear to be the case in the sphere of unilateral acts of States.

143. While it is true that a State can formulate reservations or certain conditions when performing a unilateral act, in such cases we would no longer be dealing with an autonomous unilateral act of the kind that is of interest to the Commission at present. By their very nature, such unilateral acts would have to take place within the treaty sphere. Indeed, once the acceptance of reservations or conditions comes into play, such acts are no longer autonomous in the sense in which the term is understood in the present draft. The necessity of acceptance of reservations or conditions by the addressee State turns such acts into treaty acts. The question is important; however, it was deemed advisable not to adopt a definitive position on it until the Commission has concluded its consideration of reservations, a topic which is being studied separately.

144. Another important question which arises in connection with the law of unilateral acts and which should be examined in the present draft relates to the non-existence of the act. The issue is not whether an act is valid or invalid or whether it can or cannot be invalidated for the reasons set forth above.

145. The question of the object of treaties should be viewed from two angles: first, with regard to the lawfulness of the object, which is related to the question of invalidity, and secondly, with regard to the existence of the object. A unilateral act is simply non-existent if its object does not exist.

146. It should also be stated that an act is non-existent if not formulated in the proper manner. This question is inherent in the very existence of the act, although, admittedly, it can strengthen the evidence that such an act has been formulated. An act performed in secret may have no legal force. In order for such an act to have legal effect, the addressee or beneficiary State or States must necessarily be aware of it. As Sicault notes, "[this] is a prerequisite, for, so long as a subject of law keeps a unilateral engagement to itself, it can

[66] Ibid., statement by Roberto Ago, p. 70, para. 74.

modify it as it wishes".[67] We should state at the outset, however, that this question has certain restrictions in the context of unilateral acts of States.

VIII. Future work of the Special Rapporteur

147. If the Commission so decides, the Special Rapporteur could elaborate and address in a third report all questions relating to the observance, application and interpretation of unilateral acts, as well as the question of whether the author of an act can amend, revoke or suspend the application of such acts, thus following the recommendations submitted by the Working Group in 1997.

148. In relation to observance, a provision should be elaborated on *acta sunt servanda*, as referred to in the first report, in which the binding nature of such State acts was examined.

149. As regards application, such questions as the non-retroactivity and the territorial scope of unilateral acts, and the relationship between a unilateral act and obligations previously assumed by the State formulating the act, could be addressed.

150. In addition, all questions relating to the interpretation of such acts — following to a large extent the general rules applicable to treaty acts and the question of whether and under what circumstances a State can modify, amend or revoke unilateral acts (a question which differs substantially from those raised by the law of treaties) — could be addressed.

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[67] Sicault, op. cit. (*supra*, note 25), p. 671.